

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ABDELFATAH ELLAWENDY,
Petitioner,

v.

MONTEREY COUNTY SUPERIOR
COURT,
Respondent.

Case No. 20-02708 BLF (PR)

**ORDER DIRECTING
RESPONDENT TO FILE
OPPOSITION TO AMENDED
PETITION OR STATEMENT OF
NON-OPPOSITION; STRIKING
COMPLAINT**

(Docket Nos. 2, 5)

Petitioner, a state parolee, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his 2019 state conviction out of Monterey County. Dkt. No. 1. The Court found the only cognizable claim in the petition was the claim challenging the voluntary nature of Petitioner's plea and dismissed all other claims. Dkt. No. 6. On January 27, 2021, Respondent filed an answer on the merits, Dkt. No. 12-1, ("Ans.").

Nearly six months later on July 8, 2021, Petitioner filed a document entitled "petition for a writ of habeas corpus," which the Court construes as a motion for leave to file an amended petition. Dkt. No. 15. It does not appear that Petitioner served this document on Respondent. Accordingly, the Court will set briefing on the issue of whether Petitioner should be permitted to file an amended petition at this late stage in the proceedings.

Petitioner also filed an “Amended Complaint,” against the Monterey County Office of the Public Defender and his attorney, Mr. Michael Belter. Dkt. No. 13. Petitioner seeks injunctive relief and damages. *Id.* at 11. If Petitioner wants to pursue a civil rights action under 42 U.S.C. § 1983, he must file it as a new action and be subject to the related filing fees. However, it would be premature for him to do so at this time. As Petitioner was previously advised in the Court’s Order of Partial Dismissal and to Show Cause, damages may be available through an action filed under § 1983. Dkt. No. 6. However, in order to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-487 (1994). A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487. Accordingly, Petitioner may only pursue a § 1983 action for damages only if he prevails in this habeas action. In other words, Petitioner must wait until the successful conclusion of this habeas action to file a separate § 1983 action for damages. Accordingly, the “amended complaint” shall be stricken from this action.

CONCLUSION

For the foregoing reasons and for good cause shown,

1. The Clerk shall indicate on the docket that the petition filed under Docket No. 15 is a “Proposed Amended Petition.” Dkt. No. 15. In light of this proposed amended petition, briefing on Respondent’s answer, Dkt. No. 12, is STAYED.

2. Respondent shall file with the Court and serve on Petitioner, within **twenty-eight (28) days** of the issuance of this order, an opposition to Petitioner’s proposed

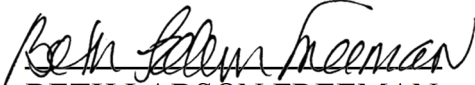
1 amended petition. Dkt. No. 15. Petitioner's reply to Respondent's opposition shall be
2 filed within **fourteen (14) days** of receipt of any opposition.

3 **In the alternative**, Respondent may file a statement of non-opposition to
4 Petitioner's proposed amended petition in the same time provided. In such a case,
5 Respondent should concurrently file a motion to withdraw its first answer, Dkt. No. 12,
6 and request an extension of time to file an answer to the amended petition.

7 3. The Clerk shall strike the "Amended Complaint" from this action. Dkt. No.
8 13.

9 **IT IS SO ORDERED.**

10 **Dated:** September 23, 2021


BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

25 Order Directing Respondent to File Opp.; Striking Am. Compl.
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